IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO : 48/2007

1. Mr. Lloyd Sequeira Vaz,
son of late Clovis Sequeira Vaz,
major, married, businessman,
residing at 12-B, Jolly Maker
Apartments-I, Cuffe Parade,
Bombay 400 005, and presently
at G-2, "Vrindavan" Next to Hotel Libdoran,
Miramar, Panaji, Goa.

2. Smt. Jeremia Sequeira Vaz,
Widow of late Clovis Sequeira Vaz,
68 years, retired,
residing at 12-B, Jolly Maker Apartments-I,
Cuffe Parade, Bombay 400 005. ..... Petitioners.

V/s.

1. Shri Inacio Albano Lourenco,
Son of late Xavier M. Lourenco,
39 years old, married,
businessman, residing at
Cujira, St. Cruz, Ilhas, Goa.

2. Mrs. Joan Crasto,
47/A, Kothachiwadi,
Girgaum, Mumbai 400 004.

3. Capt. Rosalyn Crasto,
47/A, Kothachiwadi,
Girgaum, Mumbai 400 004.

4. Mr. Charles Sequeira Vaz,
6th Floor, Surya Apartments,
Hill Road, Bandra (west),
Mumbai – 400 050.

5. Mrs. Joece Sequeira Vaz,
6th Floor, Surya Apartments,
Hill Road, Bandra (west),
Mumbai – 400 050. ..... Respondents.

Mr. M. B. D'Costa, Senior Advocate with Mr. J. A. Lobo, Advocate for the

petitioners.

Mr. T. George John, Advocate for the respondent No.1.

CORAM : S.K. SHAH, J.

DATE : 23RD FEBRUARY, 2007.

ORAL JUDGMENT:

Heard Counsel on both sides. Rule, returnable forthwith and heard finally with the consent of the parties.

2. By this writ petition, the petitioners challenge the order passed by the trial Court on 17.1.2007 upholding the objection put up on behalf of the respondents for examination of the defendant No.1 as witness of defendant No.6 and, therefore, did not allow the defendant No.6 to examine the defendant No.1.

3. The defendant No.1 is the mother of the defendant No.6. The defendant No.6 had also examined himself.

4. It is not in dispute that when the defendant No.6 was examined, the defendant No.1 was present in the Court. On the next date, the defendant No.1 was sought to be examined as witness. That was objected to on behalf of the respondent-plaintiff on the ground that the defendant No.1 was not examined before the defendant No.6 came to be examined; that the defendant

No.1 was present in the Court on the day when the evidence of defendant No.6 was over and even then the defendant No.1 could not step into the witness box; that the defendant No.1 was present in the Court when the defendant No.6's evidence was recorded and, therefore, prejudice would be caused to the plaintiff; that the name of the defendant No.1 was not disclosed in the list of witnesses given by the defendant No.6; that under Order 16, Rule 1-A of the Civil Procedure Code, it was necessary to make such disclosure of the defendant No.1's name in the list of witnesses furnished by the defendant No.6; that under Order 18, Rule 3-A of the Civil Procedure Code, it was necessary for the defendant No.1 to enter into the witness box and examine herself before the defendant No.6 came to be examined. All these objections were upheld by the trial Court and rejected the opportunity of leading evidence of the defendant No.1 after the defendant No.6 was examined. It is this order which is challenged in this writ petition.

5. I have been taken through the provisions of Order 16, Rule 1-A and Order 18, Rule 3 of the Code of Civil Procedure. I do not find any provision in the Civil Procedure Code, as also the learned Counsel for the respondents also did not point out any provision in the Civil Procedure Code which shuts out any party from leading any evidence which the party wants to lead. The provision contained in Order 16, rule 1-A provides for furnishing list of witnesses so as to facilitate the other side to know before hand who is going to be examined as witness, so that the other party is not take by

surprise. Order 18, Rule 3-A requires the party to be examined first before any witness is examined. It is needless to say that all these provisions are directory and not mandatory in nature. As already pointed out above, there is no provision pointed out curtailing power of the Court to permit a party to lead evidence of any party first. It is necessary while exercising such power for the Court to take into consideration the fact whether any prejudice would be caused to any party and in that event, give proper opportunity to the party to prepare himself for cross examining the witness who is being examined when his name was not mentioned in the list of witnesses. In the present case, the defendant No.1 is also a party to the proceedings and not merely a witness of the defendant No.6. It is true that it was not indicated that defendant No.1 would also be examined when the defendant No.6 was examined. It is also true that the defendant No.1 was present in the Court when the evidence of defendant No.6 was recorded. As a matter of fact, the defendant No.1 if was to be examined, should have gone out of the Court when the witness of defendant No.6 was being examined, so as to avoid prejudice being caused to the other side. However, that cannot be a ground to reject the opportunity of examining the defendant No.1 as party/witness, as in this case, it had happened that defendant No.1 was present in the Court when the evidence of defendant No.6 was being recorded. That fact has been brought on record. It would be relevant for consideration when the evidence of the defendant No.1 is to be appreciated while deciding the matter. However, that cannot be a ground for rejection of the opportunity of leading evidence of defendant No.1.

Non-mentioning of the name of the witnesses in the list of witnesses also does not debar the party from leading evidence of any witness. If name is not mentioned in the list of witnesses, with the permission of the Court, such witness can be examined.

6. What the Courts are required to consider is that a party should be given full opportunity to lead evidence it wants. The Court has also to take into consideration that no prejudice is caused to any party. Prejudice cannot be a ground for rejecting the opportunity to lead evidence. As observed earlier, when the defendant No.1 was present in the Court when the evidence of defendant No.1 was recorded, and that aspect can be considered while appreciating the evidence while deciding the suit. On that count, opportunity of leading of evidence of defendant No.1 either as witness of the defendant No. 6 or as party defendant No.1 cannot be rejected.

7. Under these circumstances, the learned Judge has committed illegality and impropriety in passing such order, rejecting the opportunity of leading evidence of the witness or as party. Therefore, that order needs to be set aside. The impugned order is, therefore, set aside. The Rule is made absolute in the aforesaid terms. The parties shall appear before the trial Court on 15.3.2007 at 10 a.m. and the trial Court shall allow the defendant No.1's evidence to be led.

I am informed that by order of this Court the suit is expedited and

it was directed to be disposed of and the time to dispose of the suit has already expired. It is directed that the suit be decided as early as possible and not later than end of July, 2007.

S.K. SHAH, J.

ssm.